United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

576

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,721

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES WILSON, JR.,

Appellant.

Appeal from Judgment of the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

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STATEMENT OF ISSUES

1. Whether the Trial Court had jurisdiction to try Appellant upon an indictment not approved by the Grand Jury but signed by its foreman as "A True Bill."

2. Whether the Trial Court erred in not declaring a mistrial and granting severance to Appellant because of prejudicial testimony by a co-defendant.

3. Whether such testimony was so prejudicial that the failure of the District Court to direct severance of defendant was a plain error affecting substantial rights which should be noticed on appeal although the issue was not raised by Appellant in the Trial Court.

The pending case has not previously been before this Court.

STATEMENT OF THE CASE

Appellant, Charles Wilson, Jr., was convicted in the United States District Court for the District of Columbia, Honorable Aubrey E. Robinson, Judge, on six counts of robbery in violation of 22 D. C. Code, § 2901, on seven counts of assault with a dangerous weapon in violation of 22 D. C. Code, § 502, and on one count of unauthorized use of a vehicle in violation of 22 D. C. Code, § 2204. On December 6, 1968, he was sentenced to serve two to ten years on each of the robbery and assault counts and one to three years on the unauthorized use of a vehicle count, with all sentences to run concurrently. The Trial Court granted Appellant [1/] leave to appeal in *forma pauperis*. The jurisdiction of this Court is founded on 28 U.S.C. § 1291.

The Facts

Shortly before 10:00 P. M. on November 30, 1967, a robbery occurred at the Peoples Drug Store branch at 2066 Rhode Island Avenue, N. E. (TR 12-13). The robbery was committed by three armed men, who forced the manager of the store, six other employees and a customer to lie down in the rear of the store while the robbers took money from the cash registers and some payroll checks, blank money orders and drugs from the safe (TR 13-14, 32-33, 42-43).

A few minutes after the robbery, police officers in a scout car noticed an automobile traveling at a high rate of speed go through a stop sign at 18th and Irving Streets, N. E. (TR 88, 152). They

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[1/] "Appellant," as used herein, refers only to Appellant Charles Wilson, Jr. Appellant Charles Robinson is referred to by name.

started after the car but then lost sight of it at about 15th and Irving Streets (TR 90, 152). About the same time they received a radio report of the robbery (TR 89, 152).

After a lapse of a few minutes, the police cruiser caught up with the car which they had previously been following and turned on their red light and siren (TR 91-92, 153). A high-speed chase developed which ended with the front car crashing into a tree while attempting to make a left-hand turn from Michigan Avenue into First Street, N. W. (TR 92, 153). It had been snowing, and the streets were slippery at the time (TR 92, 153). During the chase the police officers had received a report that the car which they were following had been stolen (TR 91, 153).

The police officers testified that there had been a driver and two other men in the stolen car (TR 91-92, 122, 153, 161). They also testified that Appellant had been sitting in the passenger's seat next to the driver and that he had jumped out of the front seat of the car and started running up T Street after the crash (TR 93-94, 123, 154-55). According to Officer Manning, the driver of the scout car, he had chased Appellant about 200 or 300 feet and then arrested him (TR 127-29).

Appellant testified that on the night in question he had left his home about 7:00 P. M. and gone to Louie's pool hall on T Street between Seventh and Eighth Streets, N. W. (TR 258, 267-68, 283). When a friend of his whom he had expected to meet there failed to show up by 9:30 P. M., Appellant left the pool hall and took a bus to ride to a poolroom in a house on Division Street, N. E. (TR 258-59,

268-69). Appellant testified that when he got off the bus he had a bad headache and, seeing the lights of a drug store about a half block away, he walked there to buy something for it (TR 260, 298-99). The store was the Peoples Drug Store branch at 2066 Rhode Island Avenue, N. E. (TR 260, 299).

As he reached the store, Appellant was met by two men coming out of it who forced him into a car which then drove off (TR 260-61, 301). Appellant testified that the car had a driver and passenger in the front seat and another man in the rear seat who made him get down on the floor (TR 261-62, 302-3).

Appellant testified that he was frightened and that immediately after the crash he jumped out of the back door on the passenger side of the car and started running up T Street (TR 263, 306). He confirmed that after he had gone about a half block he stopped at a call of a policeman and was arrested (TR 263-64, 306-7). He protested his innocence there, at the car where he was then taken and at the precinct house (TR 133, 264-66). Appellant denied committing any of the acts charged in the indictment (TR 267).

Appellant was not identified by any of the witnesses who had been in the drug store at the time of the robbery. When arrested, he was searched and he did not have in his possession a gun or any property taken during the robbery (TR 140). None of these items were tied to him by fingerprints or other evidence.

As stated above, Appellant testified that he had been in a pool hall in the 700 Block of T Street, N. W., for approximately two hours on the night of the robbery. Charles Robinson, a co-defendant

below, testified that he had been in this same poolroom for about a half hour of this period (TR 319, 331, 363-64). Although there were only four or five persons in the room, both Appellant and Robinson testified that they had not seen the other at the pool hall (TR 284-85, 366). In his closing argument the prosecutor referred to this testimony in attacking Appellant's credibility (TR 484).

Appellant, Maurice Winslow and Charles Robinson were jointly tried and convicted. Prior to the trial Robinson filed a Motion for Severance under Rule 14 of the Federal Rules of Criminal Procedure on the ground of prejudicial joinder. This Motion was denied by the District Court.

The presentment of the Grand Jury filed on January 2, 1968, charged Appellant with "robbery, assault with a dangerous weapon, assault on member of police force with dangerous weapon, and unauthorized use of vehicle." The indictment filed by the United States Attorney on January 22, 1968, contains 17 detailed counts. In addition to the United States Attorney's signature, the indictment bears only the signature of the foreman of the Grand Jury and it does not contain any indication that it was ever seen or considered by the members of the Grand Jury which made the presentment.

ARGUMENT

I. THE TRIAL COURT LACKED JURISDICTION TO TRY APPELLANT UPON AN INDICTMENT NOT APPROVED BY THE GRAND JURY

With respect to point one, Appellant desires the Court to read the presentment of the Grand Jury and the indictment.

On August 2, 1967, the police officer who arrested Appellant was examined before the Grand Jury by an Assistant United States Attorney. A presentment bearing the same date states:

> "We, the Grand Jurors of the United States of America, in and for the District aforesaid, upon our oaths, do Present
>
> Charles Wilson, Jr.
> Charles Robinson
> Maurice Winslow
>
> Robbery, Assault with Dangerous Weapon, Assault on Member of Police Force with Dangerous Weapon, Unauthorized Use of Vehicle.
>
> Charles Robinson
> Carrying Dangerous Weapon"

The presentment was signed by the foreman of the Grand Jury.

On January 22, 1968, the United States Attorney filed an indictment containing 17 counts charging Appellant and his co-defendants with the offenses presented by the Grand Jury. Each count described the offense alleged in such count. The indictment bore the certification "A True Bill" signed by the foreman of the Grand Jury. There is no evidence that the indictment was ever considered or voted by the members of the Grand Jury.

The Fifth Amendment requires that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury * * *." Rule 6(f) of the Federal Rules of Criminal Procedure provides: "An indictment may be found only upon the concurrence of twelve or more jurors." In Gaither v. United States (No. 21,780 and No. 22,148) and Tatum v. United States (No. 21,864), _____ U. S. App., D. C. _____, decided April 8, 1969, this Court held:

> "* * * The Fifth Amendment requires that an indictment be brought by a Grand Jury. The Grand Jury is interposed 'to afford a safeguard against oppressive actions of the prosecutor or a court.' The decision to hale a man into a court is a serious one, subject to official abuse. For this reason, 12 ordinary citizens must agree upon an indictment before a defendant is tried on a felony charge. The content of the charge, as well as the decision to charge at all, is entirely up to the Grand Jury--subject to its popular veto, as it were. The Grand Jury's decision not to indict at all, or not to charge the facts alleged by the prosecutorial officials, is not subject to review by any other body."

While condemning the local practice of trying defendants upon indictments which had not been voted by at least 12 Grand Jurors as being in violation of the Fifth Amendment, the Court in the above case held that the defendants had not been prejudiced thereby since an examination of the minutes of the meeting of their Grand Jury did not disclose any variance between the testimony there presented and the indictment. It sustained the convictions and stated that its holding would apply retroactively only in cases where defendants could show that they had been prejudiced by the failure of the Grand Jury to consider the language of the indictments upon which they were tried.

Following rehearing, the Court issued a new opinion taking into consideration the Government's claim that application of the original decision would create burdensome administrative problems

and substantial additional trial delays. _____ App. D. C. _____, decided April 24, 1969. In its second Gaither opinion, the Court stated that its ruling would apply only to indictments returned after April 8, 1969, the date of its initial decision. At the same time the Court reversed the conviction of the Appellants on the ground that since they had challenged the erroneous indictment procedure used in their case their convictions would be reversed and their indictment dismissed.

We agree with the ruling of this Court in its initial Gaither decision that an indictment which has not been voted by a Grand Jury violates the requirements of the Fifth Amendment. We submit, however, that the Court erred in such decision by considering the question of prejudice and that it erred in its second Gaither decision by holding that its ruling would apply only prospectively. The defective indictment procedure which the Court so justly condemned was not a mere technical violation of the Criminal Rules; it deprived the defendants of a basic constitutional right.

The Court recognized in its first Gaither decision that:

> "The requirement of the Criminal Rules that every indictment must be found by at least 12 Grand Jurors is a further specification of the Fifth Amendment's command that 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * *'"

And the Court properly held that insofar as infamous crimes are concerned a presentment is not an alternative to an indictment (slip opinion, p. 3).

The constitutional requirement that a defendant to a charge of an infamous crime be tried only upon an indictment of a Grand Jury

is jurisdictional and no court has authority to try a defendant without compliance with such requirement. Ex Parte Bain 121 U. S. 1, 30 L. Ed. 849, 7 S. Ct. 781 (1886). A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the Court. Jurisdiction cannot be waived. United States v. Choate, 276 F.2d 724, 728 (CA 5-1960). In Crosby v. United States, 119 U. S. App. D. C. 244, 339 F.2d 743 (1964) this Court, in overruling the Government's contention that an appellant's failure to object to trial upon a charge not contained in the indictment corrected the defect, stated:

> "The Government relies primarily on Appellant's failure to object to the dangerous-weapon charge; and without doubt this contributed substantially to the District Court's action. The Government asserts, in effect, that Appellant has waived his right to be charged by a Grand Jury for the precise offense of which he was convicted. We cannot agree. The scope of the indictment goes to the existence of the Trial Court's subject-matter jurisdiction. * * * To hold otherwise would in effect be to allow judicial amendment of the Grand Jury's indictment; this cannot be accomplished even with a defendant's consent. The Supreme Court has ruled that the Fifth Amendment's guarantee may not be so undermined. Stirone v. United States, supra; Ex Parte Bain, supra. Accordingly, we reverse Appellant's conviction."

In Ex Parte Bain, where the original indictment had been amended by the Trial Court, the Supreme Court held (121 U. S. at p. 13):

> "* * * It is of no avail, under such circumstances, to say that the Court still has jurisdiction of the person and of the crime; for, although it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the Court has no right to proceed any further in the progress of

> the case for want of an indictment. If there is nothing before the Court which the prisoner, in the language of the Constitution, can be 'held to answer' he is then entitled to be discharged so far as the offense originally presented to the Court by the indictment is concerned. The power of the Court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered. There was nothing before the Court on which it could hear evidence or pronounce sentence. * * *"

In Stirone v. United States, 361 U. S. 212, 216, 4 L. Ed.2d 252, 80 S. Ct. 270 (1960), the Supreme Court approvingly quoted the following statement in the Bain case:

> "If it lies within the province of a Court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the Grand Jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a Grand Jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says no person shall be held to answer, may be frittered away until its value is almost destroyed." 121 U. S. 1, 10.

In its first Gaither opinion, this Court recognized that the task of determining whether a defendant has been prejudiced by the failure of the prosecutor to submit the indictment which he has drafted to the Grand Jury requires "guesswork concerning what the Grand Jury might not have approved" (slip opinion, p. 18). But in the same opinion (slip opinion, p. 7), the Court noted that such guesswork was expressly condemned by the Supreme Court in Russell v. United States, 369 U. S. 749, 770, 8 L. Ed.2d 240, 82 S. Ct. 1038 (1962), as follows:

> "* * * To allow the prosecutor, or the Court, to make a subsequent guess as to what was in the minds of the Grand Jury at the time they returned

> the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a Grand Jury was designed to secure * * *"

And in Ex Parte Bain, the Supreme Court stated (121 U. S. at p. 13):

> "* * * that after the indictment was changed it was no longer the indictment of the Grand Jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the Court or prosecuting attorney * * *"

In this case the prosecutor drafted an indictment on the basis of a Grand Jury presentment and then failed to submit such indictment to the Grand Jury for its approval. Appellant, therefore, was not tried upon an indictment of a Grand Jury as required by the Constitution. Under such circumstances, the Trial Court lacked jurisdiction to hear evidence against him and to convict him. Since the lack of a Grand Jury indictment was jurisdictional, it makes no difference that the defect was not raised by motion before trial.

II. THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT A NEW TRIAL BECAUSE OF PREJUDICIAL TESTIMONY BY A CO-DEFENDANT

With respect to point two, Appellant desires the Court to read the following pages of the reporter's transcript: TR 267-68; 283-85; 319; 331; and 363-66.

Appellant was jointly tried and convicted with two other defendants, Charles Robinson and Maurice Winslow. Joinder was permissible under Rule 8 of the Rules of Criminal Procedure since the three defendants were alleged to have participated in the acts constituting the offenses charged in the indictment.

Although Rule 8 permits joinder under such circumstances, Criminal Rule 14 authorizes the Court to grant a severance of defendants if it appears that a defendant is prejudiced by the joinder. In Rhone v. United States, 125 U. S. App. D. C. 47, 365 F.2d 980 (1966), this Court pointed out that:

> "Prejudice from joinder of defendants may arise in a wide variety of circumstances as, for example, * * * where the defendants present conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that this conflict demonstrates that both are guilty * * *"

In the present case Appellant testified that on the night of the robbery he had been at Louie's Billiard Parlor in the 700 Block of T Street, N. W., for about two hours, leaving there at 9:30 P. M. (TR 258, 268, 284, 288, 309). Charles Robinson testified that he had been in the same billiard parlor for about one-half hour starting shortly after 9:00 P. M. on the same night (TR 319, 331, 363-64). Only four or five people were playing pool there at the time (TR 284-85, 366). Both Appellant and Robinson testified that they had not seen anyone they knew at the poolroom, and Robinson specifically denied that he had seen Wilson there (TR 284-85, 366).

It is submitted that the above testimony was "conflicting and irreconcilable" and clearly created the danger that the jury would "infer that this conflict alone demonstrates that both are guilty." This danger was intensified when the prosecutor, in his rebuttal argument, called the jury's attention to such testimony (TR 484). Appellant contends that under the circumstances the Trial Court erred in not declaring a mistrial and directing a severance of defendants.

Failure of the Trial Court to grant severance in cases where the testimony of one defendant was prejudicial to a co-defendant has often been held to be error on appeal. In Flores v. United States, 379 F.2d 905 (CA 5-1967), a co-defendant in a forgery trial had accused Flores of the crime. The Trial Court thereafter denied a motion for mistrial and instructed the jury to disregard the testimony. The Court of Appeals reversed, ruling that the accusation was too prejudicial to be cured by the instruction. In so doing, it quoted with approval the following statement of the Supreme Court in Schaffer v. United States, 362 U. S. 511, 515, 4 L. Ed.2d 921, 80 S. Ct. 945 (1960):

> "* * * the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear * * *"

In the Schaffer case the four petitioners had been convicted on substantive counts alleging transportation of stolen property. They had been joined as defendants on the basis of a count alleging a conspiracy between them and three other persons. The petitioners had been acquitted on the latter count and claimed improper joinder. The Supreme Court sustained the convictions, holding that no prejudice under Rule 14 had been shown. Four Justices dissented on the ground that the dismissal of the conspiracy charge had removed the common link between the defendants and that their joint trial thereafter was prejudicial to each of them within the meaning of Rule 14.

The testimony of Appellant and Robinson that they had not seen each other at the poolroom could not have been other than prejudicial to Appellant, a prejudice resulting from their joinder as defendants. Appellant's situation does not differ from that of the Appellant in

De Luna v. United States, 308 F.2d 140 (CA 5-1962), where the Court reversed the conviction because of a co-defendant's reference to De Luna's failure to testify. Similarly, in United States v. Kelly, 349 F.2d 720 (CA 2-1965), the Court reversed the conviction of a defendant in a securities fraud conspiracy case because of the introduction in evidence of a letter from a co-defendant to the Securities and Exchange Commission accusing him of fraud. In holding that an instruction to the jury could not cure the prejudice, the Court said (at p. 759):

> "It is well settled that the trial judge is under a continuing duty at all stages of the trial to grant a severance if prejudice to a particular defendant is made manifest. Schaffer v. United States, 362 U. S. 511, 516 * * *"

This Court has granted relief under Rule 14 where the Trial Court has failed to grant severance in cases where the defendant had been prejudiced by a joinder of similar offenses. In Cross v. United States, 118 U. S. App. D. C. 324, 335 F.2d 987 (1964), the Court found such joinder prejudicial because the defendant by testifying on one count of the indictment had been unable to remain silent with respect to the other. And the Court reversed the conviction in Drew v. United States, 118 U. S. App. D. C. 11, 331 F.2d 85, 94 (1964) on the ground that it could not say "that the jury probably was not confused or probably did not misuse the evidence" with respect to the two offenses joined in the indictment.

In Sims v. United States, _____ U. S. App. D. C. _____, 405 F.2d 1381 (1968), this Court reversed the convictions of three co-defendants in a murder case because of prejudicial joinder. Witnesses

at the trial had related statements made by the defendants implicating their co-defendants. The statements had been admitted by the trial judge with cautionary instructions to consider them only as to the particular declarant and to disregard them, as heresay, against the other Appellants. This Court held that severance was required by the recent decision of the Supreme Court in Bruton v. United States, 391 U. S. 123, 20 L. Ed.2d 467, 88 S. Ct. 1620 (1968), which

> "clearly shows the hollowness of such cautionary instructions and illuminates the charade of pretending that the jury can put out of its mind damaging evidence it has just heard."

In Bruton, the Supreme Court expressly overruled its prior decision in Delli Paoli v. United States, 352 U. S. 232, 1 L. Ed.2d 278, 77 S. Ct. 294 (1957). The confession of a co-defendant inculpating Bruton had been admitted in evidence with an instruction to the jury that it was to be disregarded in determining his guilt or innocence. The Court, in reversing Bruton's conviction, stated (at p. 126):

> "* * * We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' testimony violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment."

See also United States v. Bozza, 365 F.2d 206 (CA 2-1966); Barton v. United States, 263 F.2d 894 (CA 5-1959).

The instant case does not involve an implicating confession of a co-defendant, nor a deprivation of Appellant's right of cross-examination. It does involve, however, conflicting testimony of a

co-defendant prejudicially affecting Appellant's credibility. And the question of Appellant's credibility was of major significance since the Government's case against him consisted entirely of circumstantial evidence. It became even more so when the conflicting testimony was called to the attention of the jury by the prosecutor, increasing the danger pointed out by this Court in Rhone v. United States, supra, that the jury would "unjustifiably infer that this conflict demonstrates that both are guilty."

It is submitted that under such circumstances Appellant was deprived of his constitutional right to a fair trial and that the Trial Court erred in not declaring a mistrial and directing a severance of defendants.

III. THE FAILURE OF THE TRIAL COURT WAS A PLAIN ERROR AFFECTING SUBSTANTIAL RIGHTS WHICH SHOULD BE NOTICED ON APPEAL UNDER RULE 52(b)

With respect to point three, Appellant desires the Court to read the pages of the reporter's transcript called to the Court's attention at the beginning of point two.

A motion by Robinson for severance was denied by the District Court prior to trial. In view of this denial, no such motion was filed by trial counsel for Appellant although he did move for judgment of acquittal both at the close of the Government's case and at the conclusion of the taking of evidence. These motions were denied.

Where prejudicial joinder has occurred, the Court under Rule 14 may "grant a severance of defendants or provide whatever other relief Justice requires." In Schaffer v. United States, supra,

the Supreme Court considered the claim of prejudicial joinder of defendants even though only a motion for acquittal and not for mistrial was before it. Although the conviction was sustained, all nine Justices agreed that, as quoted above, "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." And in Delli Paoli v. United States, supra, the Supreme Court considered the merits of the claim of prejudicial joinder even though no motion for severance had been made. The rationale for such consideration is that failure of a District Court to declare a mistrial and grant severance where "prejudice to a particular defendant is made manifest" deprives such defendant of his constitutional right to a fair trial.

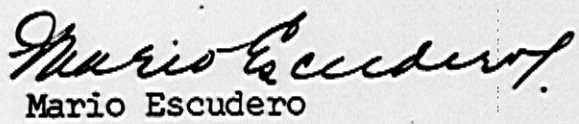
It is submitted that the testimony of Robinson was so prejudicial to Appellant that the failure of the District Court in this case to declare a mistrial and direct severance of defendants constituted "plain error * * * affecting substantial rights" which should be noticed by this Court under Rule 52(b) of the Federal Rules of Criminal Procedure.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed and the case remanded with instructions to dismiss the indictment.

Respectfully submitted,

Julius Schlezinger



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May 19, 1969

CERTIFICATE OF SERVICE

This is to certify that I have today served a copy of the foregoing Brief for Appellant by hand delivery to the office of the United States Attorney and by first-class mail, postage prepaid, to James M. Johnstone, Counsel for Appellant in No. 22,722, this 19th day of May, 1969.

Julius Schlezinger

Julius Schlezinger

UNITED STATES COURT OF APPEALS
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Defendant-Appellant,

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REPLY BRIEF FOR DEFENDANT-APPELLANT

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---

REPLY BRIEF FOR DEFENDANT-APPELLANT

I. The Trial Court Lacked Jurisdiction to Try Defendant-Appellant Wilson Upon an Indictment Not Approved by the Grand Jury.

In our main brief we pointed out that Wilson was tried and convicted upon an indictment not considered or voted upon by members of the Grand Jury. The indictment practice followed in this case was condemned in the first Gaither decision as a violation of the Fifth Amendment. Gaither v. United States (No. 21,780 and No. 22,148) and Tatum v. United States (No. 21,864) ____ U.S. App. D.C. ____, decided April 8, 1969. Following the Government's

plea that the retroactive application of its holding would bring about substantial trial delays, this Court stated in its second Gaither decision that it would apply its ruling only to indictments returned after the date of its initial decision. ____U.S. App. D.C. ____, decided April 24, 1969.

The Government urges that the first Gaither decision disposes of our contention that the Trial Court lacked jurisdiction because of the constitutional invalidity of the indictment. In support of its position it cites a number of Supreme Court decisions holding that a new rule of law need not be applied retroactively.

In Stovall v. Denno, 338 U.S. 293 (1967); Johnson v. New Jersey 384, U.S. 719 (1966); Linkletter v. Walker, 381 U.S. 618 (1965); and Tehan v. Schott, 382 U.S. 406 (1966), relied upon by the Government and cited by this Court in its first Gaither decision, the defendants had been deprived of constitutional rights spelled out in prior rulings of the Supreme Court. In each case, the Court took into account the burden upon the administration of justice which would result from a retroactive application of the ruling and refused to reverse the conviction.

The Stovall, Johnson and Linkletter cases involved police conduct in connection with arrests which the Court had held to be unconstitutional in cases decided after the conviction of the defendants. In the Tehan case the defendant had been convicted after a trial in which the prosecutor had commented upon his failure to testify, a practice which

had subsequently been held to be in violation of the Fifth Amendment guarantee against compulsory self-incrimination in Griffin v. California, 380 U.S. 614 (1965). All of these cases involved violations of procedural due process; none involved the validity of the indictment and the substantive jurisdiction of the Trial Court.

The instant case is clearly distinguishable. As we pointed out in our main brief, in the absence of a valid indictment the Court was without jurisdiction to try Wilson. At least since Ex Parte Bain, 121 U.S. 1 (1886), it has been settled law that no court has authority to try a defendant upon a charge of an infamous crime except upon an indictment of a Grand Jury. The following statement by this Court in Crosby v. United States, 119 U.S. App. D.C. 244, 339 F.2d 743 (1964) is applicable to this case:

> "The Government asserts, in effect, that Appellant has waived his right to be charged by a Grand Jury for the precise offense of which he was convicted. We cannot agree. The scope of the indictment goes to the existence of the Trial Court's subject matter jurisdiction."

The Government's contention that Wilson cannot now challenge the indictment because procedural defenses must be raised by motion before trial is without merit. The challenge here presented is not procedural; it is to the subject matter jurisdiction of the Court and the right to challenge jurisdiction cannot be waived. Here, as in Ex Parte Bain, "There was nothing before the Court on which it could hear evidence or pronounce sentence." 121 U.S., at p. 13.

II. The Trial Court Erred in Not Granting Defendant-Appellant Wilson a New Trial Because of Prejudicial Testimony by a Co-Defendant.

Citing Schaffer v. United States, 362 U.S. 511, 516 (1960), the Government recognizes that "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear" and that Wilson's failure to press the severance claim below does not amount to a waiver. It contends, however, that the trial judge in this case did not abuse his discretion in not ordering separate trials on the ground that appellants have not made a requisite showing of substantial prejudice.

In taking this position, the Government ignored the fact that Wilson was not identified by any of the witnesses to the robbery at the Peoples Drug Store and that there was no evidence placing him at the scene of the crime. The evidence against him being entirely circumstantial, the question of Wilson's credibility was of major importance. His testimony concerning his presence at Louie's Poolroom was an essential part of his alibi and Robinson's conflicting testimony constituted an attack on Wilson's credibility.

Even if this testimony of the defendants when first presented had little impact upon the jury, as the Government contends, the prosecutor made certain that this condition did not continue. By specifically calling attention to the conflicting testimony in his closing argument the prosecutor assured that it would be taken into

consideration by the jury, thereby increasing the danger pointed out by this Court in Rhone v. United States, 125 U.S. App. D.C. 47, 365 F.2d 980 (1966), that the jury would "unjustifiably infer that this conflict demonstrates that both are guilty."

We do not quarrel with the Government's contention that motions for severance are addressed to the discretion of the trial judge, but the cases cited by it in support of this proposition have no relationship to the facts of this case. Thus, in Opper v. United States, 348 U.S. 84, 94 (1954), the trial judge made clear and repeated admonitions to the jury that the co-defendant's incriminatory statements were not to be considered in determining the petitioner's guilt. In this case, the jury was not instructed to disregard Robinson's conflicting testimony in determining Wilson's guilt. Brown v. United States, 126 U.S. App. D.C. 134, 375 F.2d 310, 315 (1967), cert. denied 388 U.S. 915, involved claims by defendants that they were prejudiced by a co-defendant's insanity defense and by the existence of extra-judicial statements. These statements had not been introduced in evidence, however, and the insanity defense of one defendant had no relationship to the credibility of the other defendants. Here, Robinson's conflicting testimony was introduced and it had a direct bearing upon Wilson's credibility.

Citing Lutwak v. United States, 344 U.S. 604, 619 (1953), the Government urges that "a defendant is entitled

to a fair trial but not a perfect one." Lutwak was a conspiracy case and the Court pointed out that in such cases "declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party." (344 U.S., at p. 617.) It found only one declaration which should not have been admitted and held that this admission in the face of a record that "fairly shrieks the guilt of the parties" could not have influenced the jury to reach an improper verdict. In this case, the influence of Robinson's conflicting testimony was made inevitable by the action of the prosecutor in calling it to the jury's attention.

In Dauer v. United States, 189 F.2d 343, 344 (5th Cir. 1951), cert. denied 342 U.S. 898 (1951), relied upon by the Government, the appellant contended that the Trial Court had erred in denying his motion for a separate trial on the ground that his co-defendant had made a written confession implicating him. The co-defendant did not testify, however, and his confession was not offered in evidence.

The other cases cited in the Government brief are equally distinguishable. In none of them was the attention of the jury directed to conflicting testimony by a co-defendant bearing upon the credibility of the appellant.

The Government distinguishes DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962), on the ground that a co-defendant's reference to DeLuna's failure to testify impaired his Fifth Amendment right against self-incrimination. The essential issue in that case and in the other cases cited in our main brief, however, was identical with the issue here, i.e., had the appellants been prejudiced by the testimony of their co-defendants. In this case, defendant Wilson was prejudiced by the conflicting testimony of Robinson and the reference to the conflict by the prosecutor in his closing argument.

CONCLUSION

For the foregoing reasons and those set forth in our main brief, the judgment of the District Court should be reversed.

Respectfully submitted,

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October 1, 1969

CERTIFICATE OF SERVICE

This is to certify that I have today served a copy of the foregoing Reply Brief for Defendant-Appellant Charles Wilson, Jr., in No. 22,721, to Philip L. Kellogg, Esq., Assistant United States Attorney, to James M. Johnstone, Esq., counsel for Appellant Robinson in No. 22,722, and to John J. Dempsey, Esq., counsel for Appellant Winslow in No. 22,944.

Julius Schlezinger

October 1, 1969